BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

JERRY HARLESS,

Petitioner,

and

SUQUAMISH TRIBE,

Intervenor,

v.

KITSAP COUNTY,

Respondent.

CASE No. 15-3-0005

(Harless IV)

FINAL DECISION AND ORDER

SYNOPSIS

Petitioner Jerry Harless and Intervenor Suquamish Tribe (collectively, Harless) challenge the issuance of Kitsap County's 2014 Buildable Lands Report (BLR) for failure to comply with the review and evaluation program prescribed by RCW 36.70A.215. While the Board finds Harless's issues to some extent premature, the Board remands the BLR to Kitsap County to be brought into compliance with the statutory requirement for identification and annual monitoring of reasonable measures.

INTRODUCTION

The "core goals" of the Growth Management Act, Ch. 36.70A RCW (GMA), are to encourage development in areas already characterized by urban growth and to reduce urban sprawl.[1] Thus counties are required to adopt comprehensive plans and countywide

[1] RCW 36.70A.020 (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

planning policies that set goals for accommodation of future growth without unnecessary expansion of urban growth areas (UGAs).

In 1997, the Legislature amended the GMA to require certain counties, including Kitsap County, to implement a specific review and evaluation program to ensure urban density and containment of sprawl consistent with their adopted goals and targets. Codified at RCW 36.70A.215, the review and evaluation program is known as the buildable lands review. The program's first purpose is to evaluate progress by comparing growth projections adopted in county planning policies and comprehensive plans with actual growth and development in the preceding years. RCW 36.70A.215 (1)(a). The review "must include data from land use and activities both inside and outside UGAs and must provide for annual collection of data on both urban and rural land uses." *Kitsap County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.,* 138 Wn.App. 863, at 874, 158 P.2d 638 (2007). The data collected must be evaluated in a report completed a year prior to the statutory deadline for the jurisdiction's periodic update of its comprehensive plan. RCW 36.70A.215(2)(b). This retrospective review is necessary so that the update of the countywide policies and comprehensive plan may include amendments as needed to remedy any inconsistencies between plan goals and actual growth patterns demonstrated through the review and evaluation. RCW 36.70A.215(2)(d).

The program's second purpose is to "identify reasonable measures … that will be taken" to remedy inconsistencies, other than expanding UGAs. RCW 36.70A.215(1)(b). Reasonable measures are adopted legislatively, generally as part of the periodic update of county comprehensive plans and countywide planning policies. RCW 36.70A.215(4).[2] The

---

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.
These are identified as "core goals" by the court reviewing a previous challenge to Kitsap's buildable lands review compliance. *Kitsap County v. CPSGMHB,* 138 Wn.App. 863, at 873, 158 P.2d 638 (2007).

[2] See also RCW 36.70A.130(3): (3)(a) Each county that designates urban growth areas under RCW 36.70A.110 shall review, according to the schedules established in subsection (5) of this section, its designated urban growth area or areas, and the densities permitted within both the incorporated and unincorporated portions of each urban growth area. In conjunction with this review by the county, each city located within an urban growth area shall review the densities permitted within its boundaries, and the extent to which the urban growth occurring within the county has located within each city and the unincorporated portions of the urban growth areas.

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

county "shall annually monitor the measures adopted" to determine their effectiveness and allow appropriate adjustments. *Id.*

Kitsap County has a long and difficult record of attempting to achieve on-the-ground consistency with its adopted planning targets for urban density, rural density, and the urban/rural split. The imperative to reverse the pre-GMA trend of urban residential sprawl in rural areas and the post-GMA pattern of UGA expansions has generated a string of appeals to this Board and to the courts.[3]

The County's 2014 BLR demonstrates the beginnings of success. The County points to a remarkable decrease in the share of rural growth and development, with increased platted urban densities and a 2012 high urban share of 80% of the residential growth in that year.[4] However, inconsistent growth patterns still persist, and the present petition highlights unresolved challenges.

Harless asserts that "the 2014 BLR does not fulfil the requirements of RCW 36.70A.215 because although the inconsistencies in growth patterns have continued, the County has not annually monitored its prior 'reasonable measures' for efficacy and has not identified new measures reasonably likely to correct these persistent inconsistencies. The result is a continued pattern of growth in which overly high rural density, overly low urban density and a failed urban share target exist and continue to thwart the urban growth and anti-sprawl goals of the GMA."[5]

(b) The county comprehensive plan designating urban growth areas, and the densities permitted in the urban growth areas by the comprehensive plans of the county and each city located within the urban growth areas, shall be revised to accommodate the urban growth projected to occur in the county for the succeeding twenty-year period. The review required by this subsection may be combined with the review and evaluation required by RCW 36.70A.215.

[3] *Bremerton et al. v. Kitsap County,* CPSGMHB No. 04-3-0009c, Final Decision & Order (FDO) (Aug. 9, 2004) (*Bremerton II*).
1000 Friends of Washington, et al. v. Kitsap County, CPSGMHB No. 04-3-0031c, FDO (June 28, 2005). [Reasonable measures appendixed to 2002 BLR.]
Kitsap County v. Central Puget Sound Growth Management Hearings Board , 138 Wn.App. 863, 158 P.2d 638 (2007) [2002 BLR and 2004 reasonable measures].
KCRP v. Kitsap County, CPSGMHB No. 06-3-007, FDO (July 26, 2007).
Suquamish Tribe, et al. v Kitsap County, GMHB No. 07-3-0019c, Final Decision and Order (Aug. 15, 2007) *(Suquamish II)* [2006 reasonable measures].

[4] HOM Transcript at 35, Ms. Kneip.

[5] Petitioner's and Intervenor's Prehearing Brief ("Harless Brief") at 6.

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

STANDARD OF REVIEW AND PROCEDURAL BACKGROUND

Jurisdiction

The Board finds the petition for review was timely filed, pursuant to RCW 36.70A.290 (2). The Board finds the petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2)(b). The Board finds it has jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1)(a).

Standard of Review

Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and amendments to them, are presumed valid upon adoption. Petitioners carry the burden to demonstrate that the BLR is not in compliance with the GMA.[6]

The Board is charged with adjudicating GMA compliance and, when necessary, invalidating noncompliant plans and development regulations.[7] The scope of the Board's review is limited to determining whether a county has achieved compliance with the GMA only with respect to those issues presented in a timely petition for review.[8] The Board is required to grant deference to counties in how they plan for growth, consistent with the requirements and goals of GMA:

> In reviewing the planning decisions of local governments, the Board is instructed to recognize "the broad range of discretion that may be exercised by counties and cities *consistent with the requirements of this chapter*" and to "grant deference to counties and cities in how they plan for growth, *consistent with the requirements and goals of this chapter.*" RCW 36.70A.3201 (emphasis added).[9]

The Board "shall find compliance unless it determines that the action taken by [the county] is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA." RCW 36.70A.320(3). In order to find the county's action clearly erroneous, the Board must be "left with the firm and definite conviction that a

---

[6] RCW 36.70A.320(2).
[7] RCW 36.70A.280, RCW 36.70A.302.
[8] RCW 36.70A.290(1).
[9] *King County. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000).

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

mistake has been made." *Dep't of Ecology v. PUD 1,* 121 Wn.2d 179, 201, 849 P.3d 646 (1993).

The Board's review in the present matter is limited to determining whether Kitsap County has achieved compliance with the GMA requirements for buildable lands review set forth in RCW 36.70A.215. In reviewing a challenge to the substance of a BLR, the Board has stated:

> However, if the legal sufficiency of a BLR is challenged, the Board's scrutiny will focus on *whether the resulting BLR fulfills the purposes of the program and whether the BLR contains the key evaluation components - i.e. Compliance with RCW 36.70A.215(1) and (3)*. Simply put, based upon the review and evaluation contained in a BLR, have the jurisdictions been able to determine whether they are achieving urban densities within the UGAs and are reasonable measures needed to avoid adjusting the UGA? Thus, if a county and its cities agree upon an evaluation methodology that satisfies the minimum evaluation components of RCW 36.70A.215(3), and the results of that review and evaluation meet the purposes of RCW 36.70A.215(1), the Board will find compliance.[10]

Procedural Background

The hearing on the merits was held December 8, 2008, in Port Orchard. Petitioner Jerry Harless appeared pro se. Intervenor Suquamish Tribe appeared through their attorneys Kendra Martinez and James Bellis. Respondent Kitsap County (County or Kitsap) appeared through its attorneys Shelley Kneip and Laura Zippel. Board member Margaret Pageler convened the hearing as the Presiding Officer with Board member Cheryl Pflug in attendance and Nina Carter participating telephonically. County Commissioners Charlotte Garrido, Edward Wolfe, and Robert Gelder were present. The transcript of the hearing is referenced herein as "HOM Transcript."

DISCUSSION AND ANALYSIS

Issue 1. Failure to Identify Inconsistencies[11]

---

[10] *Seattle-King County Ass'n of Realtors v. King County*, CPSGMHB No. 04-3-0028, Final Decision and Order at 11 (May 31, 2005) *("S/K Realtors")* (emphasis added).

[11] Issue 1 is set forth in the prehearing order:

1. Does the data reported in the 2014 Kitsap County Buildable Lands Report demonstrate inconsistencies between what has occurred since adoption of the countywide planning policies and

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

The first purpose of the buildable lands review and evaluation program is to "(a) determine whether a county and its cities are achieving urban densities within urban growth areas by *comparing growth and development assumptions, targets, and objectives* contained in the countywide planning policies and the county and city comprehensive plans *with actual growth and development* that has occurred in the county and its cities. RCW 36.70A.215(1)(a). Thus actual growth and development for the review period – here 2006-2012 - must be compared with the goals and targets previously set by Kitsap County.

Harless asserts the BLR violates the statute because the report does not call out the failure of the County to meet its targets. Harless contends the BLR data demonstrates three inconsistencies:

Urban share of new housing was 12% lower than planned. The BLR states the urban share of new housing units, which increased from a mere 57% in the 2007 BLR to 67% in the 2006-2012 reporting period, "is still somewhat short of" the adopted 76% population growth target for the urban area. Index #34133, Executive Summary, at 5-6. Harless computes this as a 12% shortfall.[12] The County raises no dispute and the **Board finds as a fact** that the BLR demonstrates inconsistency between targeted urban share and actual urban share of residential development.

Rural residential development averaged much higher densities than planned.[13] BLR Table 4u-7 demonstrates constructed rural housing averaged less than one home per 2.5 acres (1du/2.5 ac) in zones with five, ten, and twenty acre per unit minimum lot sizes. Index #34133, p. 48. In all, 91% of rural homes were built on pre-GMA undersized lots, resulting in significantly higher rural densities than planned. Some 4,453 gross acres were utilized to accommodate 1,616 new residential developments, *id.,* thus contravening the GMA goal of

---

the county and city comprehensive plans and development regulations and what was envisioned in those policies and plans and the planning goals and requirements of the Growth Management Act triggering the requirement to identify and later adopt measures reasonably likely to increase consistency as required by RCW 36.70A.215?

[12] The difference is between housing units and population. The County does not dispute the Harless calculation.

[13] The BLR Executive Summary, at 3, states: rural housing densities are "generally higher than planned densities in the applicable zones."

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

reducing the inappropriate conversion of undeveloped land into sprawling, low-density development. RCW 36.70A.020(2). The BLR states: "These higher-than-currently-allowed densities are likely due to the number of smaller legal non-conforming lots of record (so-called 'legacy lots') approved under the pre-GMA density standards." *Id.* The **Board finds as a fact** that the BLR demonstrates inconsistency between planned rural residential density and density of constructed housing.

Urban residential development occurred at much lower densities than planned. The County's failure to meet urban density targets is not stated directly in the BLR, and the parties dispute the methodology used to assess the urban growth trends. They disagree on whether urban density is to be measured by construction permits or also by plat approvals.

Harless asserts the BLR "obscures the issue of urban residential density" by relying on new plats as the measure of density.[14] By this measure, the 2014 BLR indicates that urban density has been remedied as of 2012, stating:

> Urban Density Conclusions: With very limited exceptions, the average net *platted densities* of all final approved urban residential *plats and condominiums* met or exceeded adopted density targets in all jurisdictions.[15]

However, RCW 36.70A.215(3)(b) specifies that the BLR shall "determine the actual density of housing that has been constructed" within the UGA since the last periodic evaluation. Housing permit data is readily available for this analysis.

Kitsap and its cities use both housing permits and subdivision approvals in determining achieved urban densities. Kitsap cites the Department of Commerce *Buildable Lands Program Guidelines,* referenced in WAC 365-196-315(4)(c), which expressly states that platted densities may be used as part of a BLR. A review of other jurisdictions' BLRs shows that five of the six counties preparing BLRs utilized plat data in their evaluation.[16]

[14] Harless Brief, at 9, citing Index #34133, Exec. Sum. at 3, and Index #34002, Transcript of Commissioner briefing, 10th unnumbered page.
[15] Index #34133, Exec. Sum. at 3 (emphasis added).
[16] Kitsap County's Brief, at 14, fn. 35.

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Further, Kitsap points out that the Board in *S/K Realtors* cited, presumably with approval, the use of both permit and plat activity in a BLR to determine new dwelling units.[17]

Although permits reflect actual construction, the lots they are on may have been created many years ago before urban-density zoning was considered.[18] Permitting of new single-family homes on these parcels, often called "legacy lots," appears to be the primary contributing factor to Kitsap's resulting urban densities coming in far lower than targeted, as shown on the residential permit tables for UGAs in Chapter 4 of the BLR. This perpetuates sprawl and increases pressure to expand the UGA. In the Board's view, to the extent pressures on the urban growth boundary are the result of homes being built on pre-GMA oversized urban lots, having both platting and permit data in its BLR should give Kitsap the information it needs in order to craft reasonable measures to avoid expanding its UGA.

This Board has previously held it will give deference to a jurisdiction's choice of methodology for preparing a BLR:

> Since the provisions of RCW 36.70A.215 establish very broad parameters for the type of data to be collected and the methodology to be used, and requires the design of the review and evaluation program be the product of a collaborative process between a county and its cities, *the Board will give deference to the agreed-upon approach used by jurisdictions participating in the program*. [19]

On these facts, the **Board concludes** Harless has not shown the County's methodology to be clearly erroneous.

The County disputes Harless's computation of urban densities but offers no specific corrections and acknowledges there are still inconsistencies with County targets.[20] On the disputed record, the **Board finds** the BLR demonstrates unquantified inconsistencies between the County's urban density targets and the actual development that has occurred.

---

[17] *Seattle-King County Ass'n of Realtors v. King County,* CPSGMHB No. 04-3-0028, FDO (May 31, 2005), at 16. In summarizing King County's BLR methodology, the Board notes the data pertaining to net new dwelling units "specifically breaking out development activity . . by permit activity *and plat activity[.]*" (emphasis supplied).

[18] Kitsap County's Brief, p. 15, fn. 39.

[19] *S/K Realtors,* FDO at 17 (emphasis added).

[20] Kitsap County's Brief, p. 15, fn. 37

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

The County asserts that the BLR shows continued progress toward GMA compliance, encouraging and promoting urban growth and discouraging sprawl type development.[21] Kitsap County does not dispute there are still inconsistencies. These inconsistences are shown through the technical data in the BLR itself. Harless's objection that the document does not expressly highlight the discrepancies between County targets and actual growth does not mean the BLR violates GMA, in the County's view. In fact, RCW 36.70A.215(4) states only that if the BLR *demonstrates* inconsistencies, *then* those inconsistencies must be addressed through various means. Thus, Kitsap contends there is no GMA violation. [22]

The Board must agree. In the Board's view, a BLR should certainly state and summarize discrepancies between plan targets and actual growth – that is the first purpose of the exercise, after all. Here, the Kitsap BLR text emphasizes the progress made by the County but also expressly states the failure to meet urban/rural share and rural density targets. As to urban density goals, the County's failure to meet urban density targets for new housing constructed is demonstrated in the BLR data, which is the statutory requirement. The County has acknowledged the inconsistencies and is addressing them in its 2016 comprehensive planning. While a more explicit articulation of the discrepancies would be more useful in directing planning remedies, the Board does not find clear error. As the Board said in *S/K Realtors*:

> Thus, if a county and its cities agree upon an evaluation methodology that satisfies the minimum evaluation components of RCW 36.70A.215(3), and the results of that review and evaluation meet the purposes of RCW 36.70A.215(1), the Board will find compliance.[23]

Issue 1 is **dismissed**.

---

[21] Kitsap County's Brief, pp. 12-13.
[22] Harless responds that the County's reasoning puts citizens in a Catch-22; if they fail to appeal an ambiguous BLR, the County may go forward with its comprehensive plan update process without developing and adopting corrective measures and citizens may then be precluded from appealing because no timely challenge was addressed to the inadequate BLR. HOM Transcript, p.65-66.
[23] *S/K Realtors,* FDO, at 11.

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Issue 2. Failure to Monitor Effectiveness of Measures[24]

Harless contends the BLR violates the GMA by omitting a report on annual monitoring of the effectiveness of previously-adopted reasonable measures.[25] Once reasonable measures have been enacted to correct an inconsistency between planned and actual growth patterns, the GMA places a mandatory duty on counties to monitor the effectiveness of those measures annually.

> The county and its cities *shall annually monitor the measures* adopted under this subsection to determine their effect and may revise or rescind them as appropriate. RCW 36.70A.215 (4) (emphasis added)

The County responds that there is no statutory requirement for a reasonable measures monitoring report.[26]

The requirement for annual monitoring of reasonable measures effectiveness is well established in case law concerning Kitsap's BLR. In approving the County's first set of reasonable measures, adopted as an appendix to the 2002 BLR, the Board stated:

> RCW 36.70A.215(4) and (5) is quite clear about the method for determining the substantive efficacy of measures adopted and implemented under the "reasonable measures" requirement. Subsection (4) provides: "The county and its cities *shall annually monitor the measures* adopted under this subsection *to determine their effect* and may revise or rescind them as appropriate." If Kitsap County's adopted measures are insufficient, as these challengers allege, the annual monitoring will demonstrate the failure and the County will be obligated to take corrective action.

1000 Friends v Kitsap County, GMHB No. 04-3-0031c, FDO (June 28, 2005) at 24 (emphasis added). [27]

The Board's Order Denying Reconsideration (July 25, 2005) in *1000 Friends*, at 3-4, underscored the point:

---

[24] Issue 2 is set forth in the prehearing order as follows:

2. Does the 2014 Kitsap County Buildable Lands Report fail to comply with the requirements of RCW 36.70A.215(4) and Kitsap County Comprehensive Plan Policy LU-11, and thus the consistency requirements of RCW 36.70A.040(3), to monitor the effectiveness of reasonable measures in force since the previous Buildable Lands Report?

[25] Harless Brief, at 11-12.

[26] HOM Transcript p. 37, l. 10.

[27] The Board noted that in light of recent staff reports "showing persistent patterns of sprawl into the rural area and underdevelopment in urban areas, Kitsap will need to intensify its efforts … to redirect growth to urban areas." *Id*. at 25.

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

> In particular, the County disputes Harless's assertion that under the Board's ruling, there will be no accountability for the efficacy of "reasonable measures."… The County points out that RCW 36.70A.215 'requires a check on [the measures] through *annual monitoring*.' The Board specifically acknowledges Kitsap County's summary of the *accountability provisions* that require the County to ensure that the measures it adopts to cure inconsistencies between the plan and on-the-ground development are actually effective. (Emphasis added)

In *Suquamish II v Kitsap County*, GMHB No. 07-3-0019c, Final Decision and Order (Aug. 15, 2007) at 54, the Board explained:

> RCW 36.70A.215(4) requires that reasonable measures must be *reasonably likely* to increase consistency during the subsequent five-year period, with a jurisdiction *annually monitoring* the measures to determine their effect so as to make necessary adjustments. From this provision two distinct evaluation requirements can be drawn: (1) adoption and implementation of "reasonably likely" measures and (2) annual monitoring. Therefore, the Board concludes that the GMA requires both pre-adoption (will the measure work) and post-adoption (has the measure actually worked) evaluation of adopted reasonable measures. (Emphasis added)

In *Suquamish II,* the Board approved Kitsap's 2007 Comprehensive Plan reasonable measures challenged by the Tribe, saying the pre-adoption analysis met the "reasonably likely" standard and "*future monitoring* of these measures will provide analysis of their success or failure." FDO, at 55 (emphasis added). Eight years later, however, with some significant progress achieved, the BLR provides no analysis of which measures contributed to the success and which may have been ineffective.

Kitsap asserts the monitoring does not have to be reported in the BLR. However, the guidelines issued by Commerce[28] recommend that countywide planning policies should establish criteria and timelines for each county or city to "[r]eport on the monitoring of the effectiveness of reasonable measures that have been adopted and implemented. Such reporting could be included in the subsequent buildable lands report." WAC 365-196-

[28] In making determinations concerning GMA compliance, the Board "shall consider" the Commerce guidelines. RCW 36.70A.320(3).

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

315(3)(d)(ii)(C).[29] This is precisely what Kitsap's comprehensive plan Policy LU-11 provides: annual monitoring reported in five-year increments with the publication of the BLR.

> **Policy LU-11** Monitor the effectiveness of adopted reasonable measures in 5-year intervals with the publication of the BLR. [30]

Notwithstanding the clear monitoring requirement, neither Harless nor Kitsap could point to any evidence in the record connected with the publication of the 2014 BLR to indicate that the County has ever conducted either annual monitoring or a 5-year monitoring of the effectiveness of its adopted reasonable measures. In fact, the 2014 BLR does not include so much as a list of currently adopted reasonable measures, much less what effect any of them may have had. Contrary to the mandatory requirement of RCW 36.70A.215(4), the Board's clear direction in *1000 Friends* and *Suquamish II*, the Commerce guidelines, and County Policy LU-11, the County has apparently failed to perform annual monitoring of reasonable measures.

The County does not dispute that the statute and the comprehensive plan require annual monitoring of existing reasonable measures.[31] Kitsap contends it collects monitoring data annually,[32] and is currently evaluating additional and existing reasonable measures through the SEPA and comprehensive plan update process. However, Kitsap argues there is no GMA requirement for any specific document reflecting the monitoring, nor is there a GMA requirement that the monitoring results are to be included in the BLR. Kitsap complains Harless is asking this Board to read a new requirement into the statute, which the Board cannot do: "[W]e do not add language to an unambiguous statute even if we believe the legislature 'intended something else but did not adequately express it.'"[33]

---

[29] The guidelines also provide that the reports on reasonable-measure-effectiveness monitoring should be made available for public review and comment. WAC 365-196-315(3)(d)(iii)(C).
[30] Kitsap County Comprehensive Plan (2012) 2-9.
[31] Kitsap County Brief, at 13-14.
[32] Addressing the lack of any such written record, the County at hearing suggested committee meetings of regional planning staff at Kitsap Regional Coordinating Council (KRCC) may have had such discussions. HOM Transcript, p. 45.
[33] *Preserve Responsible Shoreline Management, et al., v. City of Bainbridge Island and the Washington State Department of Ecology,* GMHB No. 14-3-0012, FDO at 109 (Apr. 6, 2015) (quoting *Kilian v. Atkinson*, 147 Wn. 2d, 16, 20, 50 P. 3d 638 (2002)).

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

The County[34] cites our Supreme Court's *Thurston County* decision declining to read into the GMA a requirement for identification of a specific land market supply factor in the county's land capacity analysis: "The GMA does not require a county to explicitly identify a land market supply factor or provide justification for adopting such a factor in the comprehensive plan."[35] However, the Board notes that although Thurston County was not statutorily required to identify or support a land market supply factor, the Court did not dismiss petitioner's challenge; rather, the petition was remanded to the Board to determine whether the county used such a factor and, if so, whether it was "clearly erroneous after taking into account local circumstances and deferring to the county's discretion to accommodate future growth." [36]

Similarly here, Harless has clearly met his burden to demonstrate Kitsap's non-compliance with annual reasonable measure monitoring. Whether the monitoring is documented in the BLR or in the background record is a secondary question, although it is logical that the BLR, as the data-gathering component of the review and evaluation program, would contain such information. The **Board finds and concludes** the County's action is clearly erroneous and violates the RCW 36.70A.215(4) requirement for annual monitoring of reasonable measure effectiveness. The **Board therefore remands** the 2014 BLR to the County to be brought into compliance.[37]

Issue 3. Failure to Identify Reasonable Measures[38]

The second purpose of the review and evaluation program established by RCW 36.70A.215 is to "Identify reasonable measures, other than adjusting urban growth areas,

---

[34] HOM Transcript, p. 45. l. 20.
[35] *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.,* 164 Wn.2d 329, 352, 190 P.3d 38 (2008).
[36] 164 Wn. 2d at 353.
[37] The County has many choices as to compliance. For example, the 5-year record of KRCC staff meetings might be reconstructed, as applicable; the effectiveness analysis in the current SEPA review might be appended to a reissued BLR; countywide planning policies and comprehensive plans might be amended to provide specific reasonable measure monitoring in the future; or protocols could be developed for annual KRCC staff reports on reasonable measure effectiveness per WAC 365-196-315(3)(d)(ii)(C).
[38] Issue 3 is set forth in the prehearing order as follows:

3. Has Kitsap County failed to comply with the requirements of RCW 36.70A.215(1)(b) and (4) to identify in its 2014 Buildable Lands Report measures that are reasonably likely to reduce the inconsistencies demonstrated in that report (see Legal Issue #1) in that it identifies no measures to address the local circumstances that have caused and continue to cause these inconsistencies?

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

that will be taken to comply with the requirements of this chapter." RCW 36.70A.215(1)(b). These measures are further defined as "measures that are reasonably likely to increase consistency during the subsequent five-year period." RCW 36.70A.215(4).

Harless and Kitsap agree that the BLR should contain some identification of reasonable measures but disagree on the extent of analysis required. Kitsap contends an appendix containing previously adopted measures is sufficient. Harless argues the measures must be reasonably likely to address the actual causes of the inconsistencies demonstrated in the data. As discussed below, the Board determines that the County's BLR fails to provide the required threshold identification of measures, but Harless's demand for a substantive analysis of such measures is premature.

The purpose section of the BLR – subsection 1 of RCW 36.70A.215 - states that a review and evaluation program must *identify* reasonable measures, but the substantive provision (subsection 4) explains that the adoption and implementation of reasonable measures is an action taken *after* a BLR is done. Kitsap properly characterizes this as a two-step process: (1) the BLR process is used to analyze data to determine whether inconsistences exist, and (2) if inconsistencies are demonstrated, *then* the jurisdiction must adopt and implement reasonable measures to address those inconsistencies. According to the County, threshold identification of measures is required in the BLR under RCW 36.70A.215(1)(b),[39] and adoption of measures is then required by the deadline set for the *next update* under RCW 36.70A.130(3). [40]

---

[39] Kitsap County's Brief, p.18; "The BLR report identifies existing reasonable measures, as required by the statute." See, e.g., *Bremerton II,* GMHB No. 04-3-0009c, FDO (Aug. 9, 2004), at 53: In review of the Kitsap County 2002 BLR: "Chapter X of the BLR is entitled "Recommendations and Reasonable Measures," but there is no indication of any reasonable measures in this chapter…. *A required component of the BLR is missing*."(emphasis added)

[40] *FEARN et al. v. City of Bothell,* CPSGMHB No. 04-3-0006c, Order on Motions (May 20, 2004) at 7: "[O]ne of the purposes of the review and evaluation program of RCW 36.70A.215(1)(b) is to "*Identify* reasonable measures, other than adjusting urban growth areas, that *will be taken* to comply with the requirements of this chapter." The September 1, 2002 evaluation [BLR] was to identify measures that will be taken in lieu of adjusting the UGA….Nonetheless, if the buildable lands review and evaluation that is completed by September 1, 2002 demonstrates inconsistencies as noted in RCW 36.70A.215(3), *then* jurisdictions must adopt and implement the identified measures [reasonable measures] to increase consistency… [no later than] the December 1, 2004 deadline established in .130(4)." See also, *Bremerton II,* FDO (Aug. 9, 2004).

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

The County asserts its existing measures are identified in BLR Appendix E.[41] The BLR, Executive Summary, at 4, states: "The County's adopted reasonable measures are included in Appendix E of this report." However, that does not appear to be the case. Harless identifies Appendix E as a table from the County's Final Environmental Impact Statement prepared for the 2006 Comprehensive Plan update.[42] The table lists 46 measures as "KRCC Reasonable Measures Title (Based on 6/13/05 draft)." The Board previously reviewed this 46-measure list in *Suquamish II* in 2007*:*

> This document lists the 46 measures developed by the Kitsap Regional Coordinating Council (KRCC), most of which provide no analysis as to their potential success.[43]

The *Suquamish II* decision describes how the 46-measure list in the BLR was then supplemented with "a brief analysis of the effectiveness of each measure" and "a low-to-high rating system of effectiveness based on the jurisdiction implementing the measure," *id*. at 55, prior to selection and adoption of reasonable measures in the 2006 comprehensive plan.

Appendix E as an attachment to the present 2014 BLR, however, does not identify the adopted 2006 reasonable measures, nor any adopted since then, nor those being considered for adoption in 2016. The eighteen measures identified in Appendix E, column 4, as adopted by Resolution 158-2004 are the same "litany of measures" thrown out by the court of appeals in 2007 for being unlikely to increase consistency.[44] Presumably some of the remaining measures were among those adopted in 2006 and are still in effect, but Appendix E fails to identify them. Nor are we informed of any measures suggested for

---

[41] HOM Transcript, p. 48, l. 5-6, Ms. Kneip: "Appendix E is the identification of existing reasonable measures."

[42] Index #34133 at App. E, Table C-1 at C-3. Note the column heading at upper left corner and page footer provides a date of June 13, 2005, and page numbers.

[43] *Suquamish II,* FDO at 54: "Suquamish asserts that the County has failed to perform this evaluation, with the County relying on bare assertions or simply providing no analysis at all. Suquamish relies on Appendix C of the FEIS – Reasonable Measures Review – to support its argument, pointing to the column entitled "Quantified or Analyzed for Review in 10-year Update." … Suquamish further cites to the County's analysis of reasonable measures in Appendix C of the FEIS which revealed that some of these measures [duplexes, condominiums, cluster developments, ADUs, mixed-use developments, and density bonuses] were shown not to have significantly increased the capacity within the UGAs – in other words, they were not reasonably likely to produce the desired effect."

[44] *Kitsap v. CPSGMHB,* 138 Wn. App. at 876.

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

adoption with the 2016 comprehensive plan update. Given the professionalism and commitment to GMA compliance of Kitsap officials, Appendix E "Reasonable Measures" is an embarrassment.

The Board is left with a firm and definite conviction that a mistake has been made. In the Board's view, the BLR duty to "identify reasonable measures" requires, at a minimum, (a) a list of currently-adopted reasonable measures, with perhaps a summary of monitoring data as to their effectiveness, and (b) suggested additional measures for discussion, preferably with a brief notation as to the particular inconsistency each measure is hoped to address.[45] The **Board finds** that the County has not made the threshold identification of reasonable measures required by RCW 36.70A.215 (1)(b) and **therefore remands** the 2014 BLR to the County to be brought into compliance.

As to the *substance* of the measures identified under RCW 36.70A.215(1)(b), the Board concurs with the County that Harless's challenge is premature and must await the County's legislative action of adopting measures pursuant to RCW 36.70A.215(4).

While Harless admits adoption of measures occurs through the comprehensive plan update, he argues the BLR must contain at least an identification of measures that are calculated to address the root cause of Kitsap's failure to meet its GMA targets. Harless points out that the County has, in all three of its BLRs, thoroughly documented a single local circumstance causing all three of the inconsistencies which have thwarted its planning efforts all these years. The driving force causing the inconsistencies with rural density, urban density and urban share of growth is the large number of pre-GMA non-conforming lots of record, or "legacy lots," which dominate the County's residential land supply.[46] These lots are too small for rural areas and too large for urban areas; their development is the epitome of sprawl.[47]

---

[45] Analysis, evaluation and adoption of measures take place in the comprehensive plan update, not in the BLR.

[46] Index #34130 (2002 BLR) at 3, 11 and 15; Index #33997 (2007 BLR) at 14, 25, 44 and 55; Index #34133 (2014 BLR) at 20, 43 and 48.

[47] HOM Transcript, pp. 8-9: Harless: "Five years after the Navy established its first base here in Kitsap County [1891], Seattle hype over the Klondike Gold Rush unleashed a horde of land speculators who sub-divided the recently logged-over lands into grids of small lots far from roads or services. By the 1950s and '60s, Kitsap's extensive saltwater and lake shorelines had been divided into tiny lots for camping, vacation homes, and, later,

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

In Harless's view, given that the root cause of the inconsistencies is this local circumstance of non-conforming legacy lots, and that previously adopted measures have been only partially effective, a reasonable person must conclude that the only measures likely to reduce these inconsistencies are policies/regulations to directly address the legacy lot problem.

Harless's argument is compelling. The BLR demonstrates that 91% of rural residential growth is occurring on pre-GMA platted lots, many of which are so small as to generate densities that compel urban-level roads and services. The BLR demonstrates that a great deal of urban residential growth is occurring on overly-large parcels, defeating the provision of efficient and compact urban services and hastening pressure to expand UGAs. Unless measures are adopted which are reasonably calculated to address these legacy lot challenges, it seems unlikely the discrepancies with County growth targets can be cured. It seems logical that a more robustly-analyzed list of identified measures would provide more productive guidance to the County and its citizens as they consider which measures to adopt.

Nevertheless, the Board agrees with the County that ruling on this question would be premature. Kitsap's SEPA review of its comprehensive plan update is underway, including analysis of reasonable measures to be considered for adoption.[48] Mr. Harless and the Suquamish Tribe are active participants in that process and may well shape the policy outcomes. The Board declines to make a preliminary ruling on the substantive reasonableness of the list of measures in BLR Appendix E or on the proposed measures currently under SEPA review prior to their adoption. Harless's request for a finding of non-compliance because identified measures do not address the legacy-lot dilemma is **dismissed** as premature.

In sum, **the Board finds** the County's BLR fails to provide the required threshold identification of measures; the BLR is **remanded** to be brought into compliance.

---

permanent homes. During the 1970s and '80s, vast tracts of rural forest lands were divided into five- and ten-acre tracts which were sold to owners who then short-platted them into acre-and-a-quarter and two-and-a-half acre lots amidst a maze of private gravel roads."

[48] The briefs of both Harless and Kitsap here have strayed beyond the BLR and into the substance of the ongoing SEPA and comprehensive plan process. The Board disregards such references.

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Issue 4. Perpetuation of Sprawl[49]

Harless asserts Kitsap violates GMA's core goals by failing to identify or adopt measures directed at reducing the sprawl associated with continued development of legacy lots. The County responds that the issue is premature, as adoption of reasonable measures is not required until the time the 2016 comprehensive plan update is adopted.

The Board's jurisdiction is limited to determining whether a GMA action complies with GMA, and Kitsap has not yet acted to adopt new reasonable measures. Harless must seek to persuade the elected Board of County Commissioners to adopt GMA-compliant policies through the public legislative process. Dictating substantive legislative actions is beyond the Board's remedial powers. Issue 4 is **dismissed** as premature.

ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the Growth Management Act, prior Board orders and case law, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

- The Kitsap County 2014 Buildable Lands Report fails to comply with RCW 36.70A.215(4) with respect to annual monitoring of the effectiveness of adopted reasonable measures.
- The Kitsap County 2014 Buildable Lands Report fails to comply with RCW 36.70A.215(1)(b) with respect to identification of reasonable measures.
- The Board remands the 2014 BLR to the County to be brought into compliance with the GMA as set forth in this order.
- The following schedule shall apply:

[49] Issue 4 is set forth in the prehearing order as follows:

4. Has Kitsap County failed to be guided by RCW 36.70A.020(1) and (2) and failed to comply with the requirements of RCW 36.70A.215 and RCW 36.70A.110 when three consecutive Buildable Lands Reports, including the latest 2014 report, have demonstrated the same inconsistencies (see Legal Issue #1) and identified the local circumstances causing these inconsistencies, but the County has neither identified nor adopted measures to address those local circumstances, leading to the perpetuation of sprawl as the predominant pattern of residential growth in the County?

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

Item	Date Due
Compliance Due	June 30, 2016
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	July 14, 2016
Objections to a Finding of Compliance	July 28, 2016
Response to Objections	August 11, 2016
Compliance Hearing Location to be determined	**August 23, 2016** **10:00 A.M.**

ENTERED this 22nd day of January, 2016.

Margaret Pageler, Board Member

Cheryl Pflug, Board Member

Nina Carter, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[50]

[50] A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253